Office-Supreme Court, U.S.
FILED
JUL 30 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-18

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

PERRY EDWARD WOOLRIDGE - - Petitioner

vs.

COMMONWEALTH OF KENTUCKY - Respondent

On Writ of Certiorari to the Supreme Court of Kentucky

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STEVEN L. BESHEAR
Attorney General

RICHARD O. WYATT
Assistant Attorney General
Capitol Building
Frankfort, Kentucky 40601
Counsel for Respondent

WEST PUBLISHING CO., 610 W. KENTUCKY—P.O. BOX 8231, LOUISVILLE, KY.

TABLE OF CONTENTS

	PAGE
Table of Contents	i
Table of Authorities	ii
Opinion Below	1
Objection to Jurisdiction	1– 2
Statement of the Case	2– 4
Reasons for Not Granting the Writ	4–11
I. The Trial Court Properly Accepted the Jury Verdict After Polling	4– 7
II. The Prosecutor's Closing Argument Did Not Deny Petitioner's Rights	7–10
III. Summary	11
Conclusion	11
Appendix	13–40
Appendix A (Rule of Criminal Procedure—RCr 9.84 and 9.24)	13–17
Appendix B (Selected portions of Transcript of Evidence)	17–36
Appendix C (Opinion of Supreme Court of Kentucky)	37–40

TABLE OF AUTHORITIES

Cases: PAGE

Agins v. City of Tiburon, 447 U. S. 255, 100 S. Ct. 2138, n. 6 (1980) 2

Bledsoe v. Commonwealth, 10 Ky. Law Reports 909, 11 S. W. 84 (1889) 5

Bogie v. Commonwealth, Ky., 467 S. W. 2d 767 (1971) 4

Cal. Retail Liquor Dealers Association v. Midcal Alum., 445 U. S. 97 (1980) 2

Donnelly v. DeChristoforo, 416 U. S. 637, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974)..... 9

Elswick v. Commonwealth, Ky., App., 574 S. W. 2d 916 (1978) 10

Hunt v. Commonwealth, Ky., 466 S. W. 2d 957 (1971) 9

Jump v. Commonwealth, Ky., 444 S. W. 2d 723 (1969) 9

Martin v. Commonwealth, Ky., 477 S. W. 2d 506 (1972) 9

Mathis v. Commonwealth, Ky., 447 S. W. 2d 641 (1969) 6

Meader v. Commonwealth, Ky., 363 S. W. 2d 767 (1971) 4

Redd v. Commonwealth, Ky., App., 591 S. W. 2d 704 (1979) 9

Wood v. Chesborough, 228 U. S. 672 (1913) 2

Woolridge v. Commonwealth, Memorandum Opinion 1

Wright v. Commonwealth, Ky., 455 S. W. 2d 561 (1970) 4

Other:

Rule 17 Rules of the United States Supreme Court 11

Webster's Third New International Dictionary 1974, G. C. Merriam Company, Sprinfield, Massachusetts 8

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 81-18

PERRY EDWARD WOOLRIDGE - - - *Petitioner*

v.

COMMONWEALTH OF KENTUCKY - - *Respondent*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The opinion of the Supreme Court of Kentucky is unreported and is set out in the petitioner's Appendix A, and respondent's Appendix C, herein.

OBJECTION TO JURISDICTION

Respondent submits that the judgment rendered by the Supreme Court of Kentucky as regards the two issues raised in the subject Petition, is based solely on state or nonfederal grounds that are adequate to support that judgment, *Woolridge* v. *Commonwealth*, Memorandum Opinion. The issues involve application of a state Rule of Criminal Procedure (RCr), 9.84

(Appendix A), and the discretion of the trial judge regarding the latitude allowed counsel during closing remarks, and the adequacy of the trial court's admonition concerning such remarks.

The application of state law by the Supreme Court of Kentucky does not raise a federal question for review by this Honorable Court. *Agins* v. *City of Tiburon,* 447 U. S. 255, 100 S. Ct. 2138 at 2141, n.6 (1980). Decisions of a state's highest court regarding matters of state law are accorded great weight and consideration by this Court. *Cal. Retail Liquor Dealers Association* v. *Midcal Alum.,* 445 U. S. 97 (1980). For these reasons, respondent objects to this Court's jurisdiction of this matter. *Wood* v. *Chesborough,* 228 U. S. 672 (1913).

STATEMENT OF THE CASE

I. Nature of the Case

This is an application for a Writ of Certiorari to the Supreme Court of Kentucky wherein that court denied petitioner's Petition for Rehearing of the decision of that court. After trial by jury upon a charge of the murder of Mr. Willie P. Olive, Petitioner was convicted of First Degree Manslaughter and sentenced to twenty (20) years imprisonment.

II. Facts of the Case

At petitioner's trial, the Commonwealth presented testimony by several investigating officers of the Louisville Division of Police: Detective Jim Johnson (Tran-

script of Evidence, hereinafter TE, 18-53), Officer Eddie Stewart (TE 531-72), Detective Richard King (TE 72-88), Detective Alvin Lenley (TE 88-93), Detective Steve Owen (TE 212-237), and Detective Pat Sowers (TE 237-245); by several technical experts: William McBrayer, Kentucky State Police Crime Lab Technician (TE 93-103), Dr. George Nichols, Kentucky Chief Medical Examiner (TE 104-111), and John Newton, Kentucky State Police Crime Lab Chemist (TE 111-120); by several relatives or employees of appellant: James Lewis (TE 120-141), Albert Berry (TE 142-162), Robert Briscoe (TE 162-178), James Woolridge (TE 178-198); by a negihbor, Victoria Young (TE 198-207); and by relatives of the victim, Mr. Olive: his daughter, Wilma Olive (TE 208-212) and his son, Willie Olive, Jr. (TE 246-255). Part of the evidence presented by the Commonwealth included the pretrial statement of appellant which was taken on the day of the killing, and was entered into evidence without objection (TE 215-232, Appendix B, and TE 315).

The only witness for the defense was the appellant (TE 263-316). One of the defense exhibts was the pretrial statement of appellant (TE 315, Appendix B).

Following the instructions and closing arguments for each party, the case was submitted to the jury. After deliberation, the jury returned with the verdict of guilty on the manslaughter, first degree, instruction (TE 356). The foreman had improperly written the prison sentence, which was the maximum, 20 years. After sufficient questioning to determine that the jury

had determined appellant's sentence, the court corrected the foreman's transcription error (TE 356-358, Appendix B). Also, the court polled each juror to be certain it was correct (TE 358-361, Appendix B).

REASONS FOR NOT GRANTING THE WRIT

I. The Trial Court Properly Accepted the Jury Verdict After Polling.

Respondent agrees with petitioner's assertion and cited authority that it is error for a trial judge to accept a defective or ambiguous verdict from a jury. However, this point and those cases are not relevant to this appeal. In the subject trial, the judge specifically *refused* to accept an ambiguous verdict. After extensive questioning of the jury foreman, the judge determined that the clear intent of the jury was to set the maximum penalty of 20 years in prison, and the court properly reformed the improperly written verdict to conform with the actual verdict of the jury.

Petitioner has cited cases [*Bogie* v. *Commonwealth*, Ky., 467 S. W. 2d 767 (1971); *Meader* v. *Commonwealth*, Ky., 363 S. W. 2d 219 (1963); and *Wright* v. *Commonwealth*, Ky., 455 S. W. 2d 561 (1970)] which held that it was not error to send a jury back for further deliberations to correct a verdict which was unclear, or ambiguous. However, it does not follow from these cases, as petitioner argues, that it is reversible error to correct such a verdict upon proper instructions, if the jury's intention is clearly ascertainable in open court. Contrary to petitioner's asser-

tion, there is no evidence by the record that the trial court "acted as a thirteenth juror" or in any manner pressured either the foreman or the jury. The verdict had simply been written improperly. The judge, therefore, questioned the foreman:

> Court: No, but I mean if you found the defendant guilty under Instruction No. 2. If you found the defendant guilty under Instruction 2, then it's incumbent to narrow it down to somewhere between the ten and twenty years. Ten to twenty years is not sufficient. It's got to be ten years, eleven years, twelve years, thirteen years, fourteen years, something within that range.
>
> Mr. Allmond: We recommended twenty years.
>
> Court: Now, was that unanimous, also?
>
> Mr. Allmond: That was unanimous.

(TE 358, Appendix B.)

Upon satisfaction that a proper verdict had been reached, the judge properly corrected the verdict, and polled each juror to be certain that what the foreman had reported was in fact their verdict. Each affirmed that it was.

The crux of the issue here in contention is whether this procedure by the trial court was correct; and in accord with RCr 9.84. This issue has previously been decided adversely to petitioner.

In *Bledsoe* v. *Commonwealth,* 10 Ky. Law Reports 909, 11 S. W. 84 (1889), the jury was instructed that if they found defendant guilty of murder, the sentence was to be death or life imprisonment; and if they found

the defendant guilty of manslaughter, the maximum penalty was 21 years imprisonment. The jury returned a verdict of guilty of murder and fixed his sentence at 99 years in prison. In open court, the trial judge reformed the verdict sentence to life in prison. In endorsing this procedure, the appellate court stated:

> Therefore, the verdict, as reformed by the court, expressed in unambiguous terms what was manifestly the verdict of the jury; and they agreed in open court, in the presence of the appellant and his attorney that said verdict, as written out by the court, was their verdict.

Id., 11 S. W. at 85.

Such was the procedure in the instant case.

In *Mathis* v. *Commonwealth*, Ky., 447 S. W. 2d 641 (1969), the jury returned a verdict of guilty which stated a penalty of one-year imprisonment but did not state which, if either, of two defendants they had found guilty. The judge inquired of the foreman whether it had been the jury's intention that both defendants were guilty and that each be sentenced to a year's imprisonment. Upon affirmative answer, the judge corrected the verdict and polled the jury. In approving this procedure, the appellate court stated: "We think the action of the trial court simply made the verdict conform to the intention of the jury." *Id.* at 644. Such was the procedure in the instant case.

It is clear that the trial court in the instant case had two options. He could have sent the jury back out of the courtroom to reform its verdict, or he could

have corrected the transcription error as instructed by the foreman and polled the jury. The trial judge selected the latter option, and acted within established procedure.

II. The Prosecutor's Closing Argument Did Not Deny Petitioner's Rights.

A. Use of the word "partner."

The prosecutor's use of the term "partner" in his closing arguments was neither error nor prejudicial to petitioner. Although petitioner did try to characterize the relationship between himself and Mr. Olive as that of landlord-tenant, even from petitioner's own description, the extent of the relationship is not totally clear:

1. The two had an unwritten, "gentlemen's agreement" (TE 264).

2. The two men shared the expenses of the business (TE 265), each paying one-half of the utilities (TE 284).

3. Before petitioner could effect dissolution of the relationship, a stock inventory was required (TE 267).

4. However the relationship is characterized, the petitioner was responsible for payment of all sales tax (TE 290), and held all liquor licenses exclusively in his own name (TE 279).

That others might have thought this "gentlemen's agreement" to be a rental agreement, does not make it so. Even if, as noted by the trial court at TE 353,

the relationship between petitioner and Mr. Olive was not that of legal partners, it was certainly of such a nature as to be properly referable in the vernacular as "partners" and was a fair inference from the record. A partner is merely any person that shares in the possession or enjoyment of something with another person, a person that is associated in any action with another person. Synonyms are associate or colleague. See *Webster's Third New International Dictionary,* Phillip Babcock Grove, Editor in Chief, G. C. Merriam Company, Springfield, Massachusetts.

Based upon the record, the prosecutor's use of the word "partner" was not error. Even if it were improper, it was a brief remark, promptly remedied by the petitioner's timely objection and jury admonition by the trial judge (TE 348). The prosecutor dropped the use of the term and it was not thereafter mentioned. Further, the issue of whether the two were in fact partners has no determinative value or substantive bearing as to petitioner's guilt or innocence. The error, if any, was therefore harmless. RCr 9.24 (Appendix A).

Further, there was no prejudice created by the prosecutor's remark. Petitioner contends prejudice, stating on page 19 of his brief:

> In short, the prosecutor was attempting to show that the Petitioner stood in a position to enjoy financial gain from the death of the decedent through insurance proceeds or a complete take-over of the business as a result of the fictitious "partnership" status.

Such is not a necessary inference from the prosecutor's statement, and upon review, cannot be inferred. *Martin* v. *Commonwealth,* Ky., 477 S. W. 2d 506 at 508 (1972); *Redd* v. *Commonwealth,* Ky. App., 591 S. W. 2d 704 at 707 (1979); *Donnelly* v. *DeChristoforo,* 416 U. S. 637, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974). Additionally, the impression that the appellant would benefit financially by having Mr. Olive out of business was clearly presented by petitioner himself. (TE 305-307, Appendix B.) If such an inference was raised by the prosecutor also, it cannot be held as justification to disturb the conviction.

B. Impeachment of the credibility of petitioner's eyewitnesses.

Since on page 21 of his brief, the petitioner concedes the right of the prosecutor to comment on biased interest of witnesses, the respondent will not unnecessarily extend its brief by belaboring that obvious point. The financial interest of Mr. Berry and of Mr. Briscoe as employees of petitioner clearly was a proper subject of the prosecutor's comment. *Hunt* v. *Commonwealth,* Ky., 466 S. W. 2d 957 (1971); *Jump* v. *Commonwealth,* Ky., 444 S. W. 2d 723 (1969). The issue here raised, then, is whether the prosecutor's remarks concerning petitioner's possible loss of liquor license (TE 247-248) was so prejudicial as to have required a mistrial and to now justify reversing the conviction. The respondent respectfully submits that no error was committed in denying petitioner's motion for mistrial, and

no justification exists for disturbing petitioner's conviction.

First, the respondent notes that appellant has correctly asserted that KRS 243.500 does not require automatic revocation of appellant's liquor license upon conviction of criminal homicide. However, revocation of said license is a possibility upon conviction of a felony. KRS 243.390(1)(d); 243.450(2); 243.490. The prosecutor's remarks were not blatantly erroneous as petitioner would contend. Even if the prosecutor's remark was improper, it was brief, fleeting, not repeated, and was cured by the court's admonition to the jury that it should not be considered in their deliberations.

Further, there was no prejudice by the remark. As the trial court properly recognized (TE 348), the effect of the prosecutor's remark regarding the liquor license could be interpreted by the jury beneficially to petitioner. If the petitioner could lose his liquor license and business upon conviction, he would have had further incentive not to have acted intentionally in the shooting. Further, the jury might be less inclined to convict petitioner of a high-degree offense if such conviction were to trigger additional punishment in the form of liquor license revocation. Upon appellate review, the court cannot assume the jury interpreted the worst from the prosecutor's comments. Viewing the comments in context, and as a whole, there is no justification for disturbing appellant's conviction. *Elswick* v. *Commonwealth,* Ky. App., 574 S. W. 2d 916 (1978).

III. Summary.

Rule 17 of the Rules of this Court state that certiorari will be granted only where there are special and important reasons therefore. There is no conflict between the subject memorandum opinion of the Supreme Court of Kentucky and any previous opinion of this Court. The issues raised by petitioner are limited to the particular facts of the instant case and will affect few others than the litigants.

Respondent submits that petitioner has failed to state any special or important reasons for granting the writ of certiorari. Respondent further submits that the issues in this case, while important to the parties involved, are not sufficiently important to the public interest to grant the writ of certiorari.

CONCLUSION

For the foregoing reasons, respondent respectfully submits that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

STEVEN L. BESHEAR
Attorney General

RICHARD O. WYATT
Assistant Attorney General
Capitol Building
Frankfort, Kentucky 40601
Counsel for Respondent

APPENDIX

APPENDIX A

RULES OF CRIMINAL PROCEDURE

Rule 9.24 Harmless error

Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

CROSS REFERENCES

See Murrell, Kentucky Criminal Practice § 2202

---

501 SW(2d) 264 (1973), Holcomb v Com. The substantial rights of the defendant are not violated where the court imposes the minimum sentence after a jury verdict of guilty.

477 SW(2d) 779 (1972), Bellew v Com. Where misdemeanor convictions are unexpectedly brought out on cross-examination of the accused, and not commented on by the prosecution attorney, it is harmless error.

463 SW(2d) 930 (1971), Mason v Com. Where it is shown that the officer having charge of the jury performed his duties a failure to administer the oath to the officer is not a prejudicial error.

462 SW(2d) 935 (1971), Howe v Com. An error in the instructions as to the date on which the crime was committed is not prejudicial.

439 SW(2d) 949 (1969), Abernathy v Com; 439 SW(2d) 953 (1969), Walton v Com. An error is harmless unless a consideration of the whole case reflects a possibility that the results would have been different without the error.

Annotations from former section

CrC 353 ERRORS THAT AUTHORIZE REVERSAL

195 Ky 600, 242 SW 604 (1922), Bowlin v Com; 151 Ky 587, 152 SW 545 (1913), Burton v Com. A failure to admonish a jury as to the effect of impeaching evidence did not prejudice defendant's substantial rights.

* * * * * * * *

Rule 9.84 Penalty

(1) When the jury returns a verdict of guilty it shall fix the degree of the offense and the penalty, except where the penalty is fixed by law, in which case it shall be fixed by the court.

(2) When the defendant enters a plea of guilty, the court may fix the penalty, except in cases involving offenses punishable by death.

CROSS REFERENCES

See Brickey, Kentucky Criminal Law § 29.01

See Murrell, Kentucky Criminal Practice § 5.07, 16.05, 20.01

Disposition of fines, KRS 431.100

Service of sentence, KRS 431.130

Sentence to hard labor, KRS 431.140

Sentence, RCr 11.02

Judgment, RCr 11.04

Punishment. 21 Am Jur 2d, Criminal Law, § 576 to 608

Unanimity as to punishment in criminal case where jury can recommend lesser penalty. I ALR3d 1461.

Racial discrimination in punishment for crime. 40 ALR3d 227

CONSTITUTIONALITY:

311 FSupp 1234 (1970), Angelo v Howard. RCr 9.84 is constitutional.

501 SW(2d) 264 (1973), Holcomb v Com. Where the jury returns a verdict of guilty only and the court imposes the minimum sentence the substantial rights of the defendant are not violated.

490 SW(2d) 480 (1973), Debose v Cowan. In cases arising under habeas corpus proceedings one may waive the right to a jury trial where death is a permitted penalty.

490 SW(2d) 148 (1973), Franklin v Com. Where the verdict is unintelligible as to the sentence, and the defect not called to the attention of the court by the defendant, the court should fix the sentence.

451 SW(2d) 634 (1970), Ruggles v Com; 451 SW(2d) 646 (1970), Angelo v Com. Where death is among the penalties authorized the jury is required to fix the punishment; hence RCr 9.84 does not deprive the accused of a jury trial.

445 SW(2d) 845 (1969), Brown v Com. The court should not accept a verdict fixing a penalty of "death with clemency."

388 SW(2d) 568 (1965), Hicks v Com. A life sentence rendered by the judge upon a plea of guilty is not void even though the offense carried a possible death sentence.

412 US 17, 36 LEd(2d) 714, 93 SCt 1977 (Georgia 1973), Chaffin v Stynchcombe. It is not unconstitutional for the jury to fix a greater sentence, upon a retrial of the case, than that imposed by the jury on the first trial.

OAG 62-541. In absence of agreement between prosecution and defendant, with advice of counsel, or a jury determination court must render the minimum penalty. Where defendant pleads guilty, court may place degree of penalty before jury.

Annotations from former section

CrC 257. GENERAL VERDICT DEFINED

260 Ky 526, 86 SW(2d) 282 (1935), Sebree v Com. De-

fendant was indicted under habitual criminal act. There was evidence to show him guilty of the felony charged in the indictment under which he was being tried, and also of his conviction twice before for felonies. The instructions were in accordance therewith. The jury's verdict read "We find the defendant guilty and fix his punishment in the state penitentiary for life." Under these facts, the verdict was held sufficient.

216 Ky 216, 287 SW 722 (1926), Colston v Com. A verdict of manslaughter with punishment fixed at 21 years' confinement necessarily means voluntary manslaughter and so fixes the degree of the offense.

215 Ky 827, 287 SW 23 (1926), Crump v Com. If from the whole record the exact meaning and scope of the verdict can be readily determined, it will be enforced as valid.

213 Ky 323, 280 SW 1094 (1926), Green v Com. A verdict was held to contain sufficient findings of fact as to former convictions to sustain the imposition of a life sentence.

181 Ky 218, 204 SW 67 (1918), Blain v Com. When a defendant allows a jury to be discharged without objection or without motion to have them correct or extend their verdict, he will be deemed to have waived formal defects in the verdict.

181 Ky 183, 203 SW 1073 (1918), Winburn v Com. In a trial of an indictment for murder, a jury returned a verdict fixing the punishment at 99 years. The court sent the jury back to its room to correct the verdict. The jury then returned a verdict fixing the punishment at confinement in the penitentiary for life. A judgment pursuant to the second verdict was affirmed.

181 Ky 183, 203 SW 1073 (1918), Winburn v Com. In a trial of an indictment for murder, the verdict did not fix the offense nor the degree of the offense, but fixed the punishment at imprisonment for life, and added the words

"without a pardon." This was a sufficient verdict. The words "without a pardon" are mere surplusage.

Verdict is sufficient which reads "we, the jury, find the defendant guilty and fix his punishment at five years in the penitentiary." 12 KLR 611, 14 SW 833 (1890), Hays v Com; and verdict finding defendant "guilty as charged in the indictment" is sufficient when indictment only charges one offense. 86 Ky 313, 5 SW 387, 765 (1887), Patterson v Com. Wrere the several counts of an indictment all charge murder, a general verdict of guilty is sufficient. 207 Ky 718, 270 SW 5 (1925), Hall v Com. (See also Barton v Com, 17 KLR 580, 32 SW 171 (1895); Gillum v Com, 121 SW 445 (1909); Willams v Com, 140 Ky 34, 130 SW 807 (1910).).

APPENDIX B

SELECTED PORTIONS OF TRANSCRIPT OF EVIDENCE

215

A. With the homicide filed.

Mr. Stewart: At this time, your Honor, I have the tape which I would like to have marked Commonwealth's Exhibit number 20 for identification purposes only.

(Whereupon, the tape referred to above was marked as Commonwealth's Exhibit number 20 for identification purposes only.)

Q. 14. Detective Owen, I hand you what has been marked as Commonwealth's Exhibit 20 and I ask that you look at that and tell us whether or not you can identify it?

A. Yes, sir. This is one of our tape cassettes and paper that is marked as being the statement of Mr. Woolridge by me.

Q. 15. Is that your handwriting on that piece of paper?

A. Yes, sir, it is.

Mr. Stewart: Your Honor, I would like to have this tape played before the Jury.

Court: Alright.

(Whereupon, the tape recording referred to above was played before the hearing of the Jury, as follows:

216

"This is Detective Steve Owen of the Homicide Squad. Today's date is May 3, 1979. The time is 0823 hours. Present with me is Mr. Perry Edward Wollridge, III.

Q. Mr. Woolridge, are you aware that this machine is a tape recorder and that it is working?

A. Yes, I am.

Q. Are you aware that this thing is taking down every word we're saying?

A. Yes, I am.

Q. Are you further aware that at the completion of this statement, this tape will be typed up and then you'll be asked to read it and sign it?

A. Yes, I do.

Q. This tape being made with your permission?

A. Yes, it is.

Q. Okay, before we begin, I want to advise you of your Constitutional Rights again. Number 1, you have the right to remain silent. Number 2, anything you say can and will be used against you in a court of law. Number 3, you have the right to talk to a lawyer, prior to any questioning or the making of any statements and to have him present with you while you are being questioned. Number 4, if you cannot afford to hire a lawyer, one will be appointed by the Court to represent you before any questioning

217

if you desire one. Number 5, you may stop the questioning or the making of any statements at anytime, by refusing to answer further or by requesting to consult with an

attorney, prior to continuing with the questioning or the making of any statements. Do you understand your rights as I have explained them to you?

A. Yes, I do.

Q. Okay. Now from this form I'm reading from, which is Louisville Police Department form 0006, entitled Your Rights is a waiver of your rights. It says, having read this statement of my rights, I understand what my rights are. I am willing to make a statement and answer questions. I do not want a lawyer at this time. I understand to know what I am doing. No promises or threats have been made to me and no pressure or cohersion of any kind have been used against me. Do you understand that?

A. Yes, I do.

Q. Do you agree with everything that I've said?

A. I agree.

Q. Are you willing to freely make this statement?

A. I am freely to make this statement.

Q. Okay. Mr. Woolridge now if you would, would you tell me what happened this morning in

your own words please?

A. Yes. Approximately 6:05 this morning, I put a lock on my side entrance to my store and uh, approximately.

Q. Alright go on.

A. Okay, approximately 45 minutes later, Bill Olive started raising sand, telling me what he was going to do or what he wasn't gonna do. So at this point, I called the Police Department and asked for assistance.

Q. Okay. Mr. Woolridge before you continue, would you explain to me who Bill Olive is and what relation he is to you in the store?

A. Uh, at this present time, I would like to hold on to that question if possible.

Q. Sure go ahead.

A. Okay. At this, at this time, I called the Police and uh, asked them, I told them the guy was here uh, raising sand and uh, I wished to remove him from my premises. Okay. Approximately 15 minutes after that, Mr. Bill Olive comes out the front entrance with a hammer, goes around to the side entrance with a hammer, proceeds to take the lock, to bust the lock off of the, the side entrance, which he did. At this point, I was walking around the side with two other witness whose name yah have and uh, I asked him to drop the hammer and not to enter. He drew the hammer

back, at this point, I had the pistol with me with the two witnesses and I asked him to drop the hammer and not to enter and at this point, he cocked the hammer back, attempted to hit me with the hammer and I shot him and then I called the Police and the ambulance service and basically that's it to this point.

Q. Okay, now did you uh, did you call Mr. Olive to the store or did he come on his own?

A. I called him to the store, he was supposed to be there, he comes there at that time every morning anyway.

Q. Is he an employee or—

A. He helps at the store.

Q. Okay, do you pay him?

A. No.

Q. You don't pay him, he just helps out at the store?

A. He helps at the store.

Q. Does he have any connection with the business? Is he a partial owner or does he have any money invested or anything?

A. I'd rather hold on to that question please sir.

Q. Alright. Okay now, this hammer that you say he had, where did he get the hammer?

A. He got the hammer from the rear of the store.

220

Q. When he first got there?

A. Yes.

Q. Okay. About what time did he get to the store?

A. I would say he got to the store around a little before 7:00, I can't be exactly. Usually he gets there before then.

Q. Upon this morning.

A. This morning right.

Q. You had to call him?

A. Right.

Q. He's usually there when you get there, but this morning you had called him?

A. I called him correct.

Q. Okay, now were there any words between you and Mr. Olive? Did you all have an argument? Were you having a fight?

A. No. No, there wasn't really not any argument at all. I had told him what to do and what not to do and uh, he started getting boisterous and telling he what he was gonna do and what he wasn't gonna do and then like I said, at this point, I called the Police.

Q. Okay now, when you say he got, he got boisterous, is that when he went to the back and got the hammer?

A. Well, he's boisterous first

221

and then he went to the rear of the store and got the hammer and then he come back to the front to see through the front door, go around to the side entrance and then he busted the lock off the door like I said.

Q. Okay now, when he went and got the hammer, is that when you called the Police?

A. No, I called the Police when uh, before he went and got the hammer.

Q. Okay. So in other words, you all had, had words—

A. We had a few words.

Q. When he first got there?

A. Right. Right. When he first got there, we had some words and he was telling me what he wasn't gonna do and what he was gonna do and so at this time, I called the Police.

Q. Okay, this was uh, this was in relation to his duties at the store?

A. Right.

Q. But you say, he wasn't a paid employee, he just helped out?

A. I'd rather hold on on that question.

Q. Alright that's fine. Okay now, had uh, Mr. Olive been drinking?

A. No. No, he's not, he's not

222

a drinking man. Matter of fact, he had sugar diabetes.

Q. Uh huh.

A. And uh, he doesn't drink as far as I know.

Q. Okay, so as far as you know, this morning he hadn't been drinking?

A. Right. As far as I know, he hadn't been drinking.

Q. Okay now, this lock. Now you say when he went out the door—

A. The front door.

Q. The front door to go around the side, did you follow him out immediately or did you wait?

A. Uh, after he went through the front door, I asked two other gentlemen to uh, follow me, 'cause I asked them, I said, was is that he's got in his hand and they said, it's a hammer. So I said, well, come on you follow me and so the two gentlemen and my dog, we went around to the side.

Q. Okay. Did you see the hammer when he came out of the back way?

A. Through the store, right. He passed, he passed between, it was approximately five or six people in the front part of my lobby that seen him come through the front of the lobby with the hammer, proceeding around to the rear.

223

Q. Okay. Did you see, you saw him with the hammer yourself?

A. Right. Correct. Correct.

Q. Okay and you said, what was that he had and they said a hammer?

A. Right. Yeah right. Correct.

Q. Okay now, where did you get the gun?

A. The gun? I bought it previously at Sumner's.

Q. Okay now, the weapon is yours?

A. The weapon is mine.

Q. Okay, what kind of gun is it?

A. It's a .32 uh, H & R.

Q. H & R, it's your weapon? You own the gun?

A. It's my gun. I own the gun.

Q. Okay, did you have it on you or was it there at the store?

A. It was there at the store and when I proceeded out the door, I had it with me.

Q. Okay. Where, whereabouts in the store was the gun located?

A. The gun is usually located right up under the counter.

Q. Okay. You keep it there for protection?

224

A. For protection of the store and you know, for the employees protection.

Q. Okay. So you got the gun and you followed him out and asked the two men to go with you?

A. To go with me.

Q. Okay now, you all followed him out the front door on the Broadway Street side.

A. Around to the Twenty-seventh Street side.

Q. On the Twenty-seventh Street side, where the, where the lock was on the door?

A. Right. He was already out the door and, and around there and had already busted, was busting in preparation of busting the lock off of the door when I proceeded there.

Q. Okay, did you actually see him break the lock off of the door?

A. Yes, I did.

Q. Okay now, did he knock the lock off the door or did you take it off?

A. He busted it with a hammer.

Q. Okay, so the lock fell off when he hit it?

A. Right. Now he put the claw part between the, you know, you see what I mean?

Q. Yeah.

225

A. And busted it open.

Q. Okay so he didn't actually hit it, he pryes it off?

A. He pryes it open.

Q. Okay now, did the lock come undone or did he just break the hasp or the whole thing off or do you know?

A. To be honest with you, I didn't really. I'm pretty sure that the most uh, let's see, the hasp why I'm thinking came off, you see what I mean?

Q. Uh huh.

A. But I'm not really sure at this time, cause everything happened so fast and I was upset so, I'm saying this now, but it could be a little different, but this is the way I seen it.

Q. Alright. That's what we want, whatever you decide.

A. Right.

Q. Okay now, you say, that when you walked around there is was already—

A. In the process of breaking, busting the lock.

Q. He was busting the lock off?

A. Right.

Q. So you actually saw him break the lock off?

226

A. Right.

Q. Now, what, what did you say to him then?

A. I told him to drop the hammer and not to go inside.

Q. Okay.

A. And to, and to get away from the building. In other words, get away from my store.

Q. Okay.

A. At this point, at this point, he cocked back with the hammer in his hand to hit me and I stepped back and I shot. I, I really to be honest with you, I meant to shoot to scare him.

Q. Uh huh.

A. But it hit him.

Q. Okay now, now when you shot, how far away were you and Mr. Olive? How much distance was between you? Did you put the gun right up to his head?

A. I had the gun pointed at him before he even cocked back the hammer to me. In other words, I had the gun pointed at him and told him to drop the hammer, but instead of dropping it, he drawed back to hit me with it and approximately was uh, from, from the pistol to him was approximately four feet, four to five feet. So the pistol only then from about from where you are.

Q. So really there's there's

227

about six feet between you two, five or six feet and there's about four feet between the pistol and his head.

A. Yeah, just about four foot, between the pistol.

Q. Now. I want you, now is that what you're saying? I'm just trying to understand what you are saying.

A. Right. Yeah, about five feet from the pistol. From the point of the pistol with my arm stretched out and his body, about five foot.

Q. Okay. So the gun was, what you're saying when the gun went off, the gun was about five feet from you?

A. I would say yes, about five feet.

Q. Okay, and you say, you pointed the pistol at him and told him to drop the hammer and the he—

A. Correct.

Q. What he turned around.

A. Nah, he was already around facing me, when I told him and he just drawed back and I had the gun pointed right at him and he just went on, cocked his arm back to hit me anyway.

Q. Okay. I'm not, I'm not clear about, about one thing here. I want to straighten this up if you don't mind?

A. Sure.

Q. Now, you say, you and the two men walked out the store, out the front and went around the side and you saw him breaking the lock off the side door?

A. Right.

Q. Now, you told him to stop that and to get away from the store?

A. I told him, I told him, I told him to stop. I told him to drop, drop the hammer, get away from the store and don't go inside at this point.

Q. Now, when did he turn? Is this when he turned around to face you?

A. Yes. Yes. About then it uh, it had already been popped off. He turned around to face me as I was talking to him.

Q. Okay, and then you pointed the gun at him at this point and told him to drop the hammer?

A. Correct.

Q. But he drew back to hit you and you shot?

A. Correct.

Q. And you're saying your, the gun is about five feet from him when it went off?

A. Right. Correct.

Q. Okay. Now what's in that room that you didn't want him to go in there?

229

A. Well, that's the other entrance to the side beer depot. It's the deer depot, but it's got two entrance, the side entrance is also connected with the front lobby and it's the beer depot on the side.

Q. Okay, it's actually the beer depot?

A. Right.

Q. It's the back part of the store?

A. Right, the back part of the store, the beer depot.

Q. Why, why didn't you want him to open the side door?

A. Because I told him it was locked. I put the lock on the door and I was closing the door down for inventory purposes.

Q. So in other words, you weren't going to use that particular part of the store today?

A. At that nah, until late this evening.

Q. I see. You say you were going to take inventory?

A. Right. I was taking inventory of stock and the door, I put the bolt on the lock so it, no one would come through the side door, which at 6:00 o'clock it's open for people to walk in and purchase beer.

230

You see what I mean, in the beer depot and the lock was put on the door purposely, for the inventory purpose and

so no one would be disturbed as inventory was going on and we were supposed to be re-opened at 4:00 o'clock this evening.

Q. Okay. What, when did you put this lock on, this morning?

A. Yeah, about five minutes after 6:00.

Q. Okay, so right after you got there, you put the lock on the door, so you could take inventory in that part of the store today?

A. Correct.

Q. Okay, how long have you owned the store down there Mr. Woolridge?

A. Approximately two and a half years.

Q. Okay, are you the sole owner?

A. Yes. I am. Sole, I'm owner. Yes I am.

Q. The license is in your name, you own it all by yourself?

A. I own the whole thing.

Q. Okay. Okay well, is there anything else that you can think of that you want to add?

A. No, sir, at this time, no sir.

231

Q. Okay, Mr. Woolridge, has this statement that you have given, is this been made of your own free will?

A. Yes, sir, it has.

Q. Have there been any threats or promises made to you by myself or any other Officer or anybody else connected with this investigation? Has anybody promised you anything or threatened to do anything to you in order to get you to make this statement?

A. No, sir.

Q. Okay, again you're making it of your own free will?

A. Yes, sir. This statement is of my own free will.

Q. Okay, are you under the influence of any alcoholic beverage or any drug or narcotic at this time?

A. No, sir, I'm not.

Q. Okay, this statement is being ended at 0839 hours. On May 3, 1979. This statement was recorded in the interrogation room of the Criminal Investigation Section on the second floor of Police Headquarters at Seventh and Jefferson.")

Mr. Stewart: Your Honor, if I have not done so, I move that this recording be offered into evidence.

232

Court: Any objection?

Mr. Curtis: None from the Defendant at this time.

Court: It may be filed and made a part of the record as Commonwealth's Exhibit number 20.

(Whereupon, Commonwealth's Exhibit number 20 was filed and made a part of the record hereto.)

Q. 16. Detective Owen, other than the tape recorded statement that you took from the Defendant, was there any other functions that you performed?

A. No, sir, there wasn't.

Mr. Stewart: Your Honor, I have no further questions.

Court: Any cross-examination?

Mr. Curtis: I have just one or two your Honor.

Cross-examination

By Mr. Curtis:

Q. 17. Detective Owen, as to the

• • • • • • • •

305

Q. 178. Okay. Now, you were told that you didn't have to answer any questions without the aid of a lawyer to assist you. Did you nevertheless, after each Officer gave you that information, proceed to give a full statement?

A. I didn't have to go through—I didn't think I would have to go through everything I went through.

Q. 179. Now, Perry, in this Gentlemen's Agreement, let's have the Jury please understand, did Mr. Olive have

some financial obligations or was he getting the use of your building without any financial obligations?

A. He had financial obligations.

Q. 180. Now, had he paid his sales tax?

A. No, sir, he hadn't.

Q. 181. Had you at any time asked him for those sales tax for the period it was due?

A. I left word for him to bring it up.

Q. 182. Now, did he have any rental obligations to you?

A. Yes, sir.

Q. 183. And review for the Jury, again, what that rental obligation was? How much was he supposed to pay?

306

A. A hundred a month.

Q. 184. When was the last time Mr. Olive had paid that overhead?

A. Approximately two months. It had elapsed two months. It was about two—I would say three months on the light and gas, and as far as the rental fee he was just one month behind—I mean, it was coming up. It should have been in, but the month before—he hadn't paid the month before that. I was out of town a lot and usually the way he does it, he gives it to me.

Q. 185. Al right. In terms of cash flow, if Mr. Olive didn't pay on time, how did those bills get paid, sir?

A. All bills were paid by me.

Q. 186. Which meant that you were having to advance if he wasn't paying his part of the bills, taxes, and other overhead?

A. I paid all the bills regardless of whether he paid or not. I had to pay them.

Q. 187. Was that economical or uneconomical of a businessman that is trying to run a liquor store?

A. It hurts.

Q. 188. Did Mr. Olive owe you as a result of those arrearages?

A. He didn't owe me really that much, but he owed me. But it wasn't a real large sum or anything like that. I could have handled it, I felt. It wasn't

307

a lot of money or anything like that that he owed.

Q. 189. But you did want to be free of that burden on the normal operation of your business?

A. This is correct.

Q. 190. Perry, do you know people, either people who worked at the liquor store or made purchases at the liquor store or the beer depot or in the general community, who also knew Willie Pearl Olive?

A. He was well known in the community.

Q. 191. But did you know people who knew Willie Pearl?

A. Sure. Yes.

Q. 192. Did you know the opinion of any of those persons who knew Willie Olive about Willie Olive?

A. Yes, sir.

Q. 193. What was Willie Olive's reputation for peace and quiet—or quietude among those people who knew him, if you knew?

A. Well, he was a boisterous man and he would hurt you.

Q. 194. How would he hurt you?

Mr. Stewart: Objection, your Honor. We can't get into speculation.

Court: Sustained.

• • • • • • •

315

• • • and like I read over it and everything looked, you know—I was asked a lot of questions that wasn't on there.

Q. 233. And you signed and initialed every page, top and bottom, didn't you?

A. Yes, sir, I did.

Mr. Stewart: Your Honor, I believe we've had a lot of testimony about this statement. I would ask that a copy of it be introduced into evidence.

Court: Any objections?

Mr. Curtis: Not from the Defendant. Judge, may the record reflect that the Jury will have the benefit of both the recorded statement showing the tone and intensity of cross-examination as well as the transcribed document reflected.

Court: I think the statement has already been filed and made a part of the record.

Mr. Curtis: Judge, may that also be Defendant's Exhibit number 2?

Court: Any objection to that, Mr. Stewart?

Mr. Stewart: No, sir.

* * * * * * *

356

Mr. Allmond: Yes, sir.

Court: —I see you have the Instructions and the verdict in your hand. May I properly presume or assume you acted as Foreman?

Mr. Allmond: Yes, sir.

Court: Did the Jury reach a verdict?

Mr. Allmond: Yes, sir.

Court: Would you read the verdict, please, that the Jury reached?

Mr. Allmond: The verdict of this Jury is that the defendant will be charged on Instruction No. 2, Manslaughter, for not less than 10 or more than 20 years.

Court: Well, did you sign the verdict?

M . Allmond: Yes, sir.

Court: Isn't there a blank provided there to fill in, and did you fill that in?

Mr. Allmond: We filled the blank in.

Court: Would you read, please, what the verdict is then? That's what I'm asking.

Mr. Allmond: You didn't hear me, sir?

357

Court: Well, you said 10 to 20 years, but I need to know what the verdict was exactly.

Mr. Allmond: I don't quite understand, Your Honor.

Sheriff: How many years, sir?

Mr. Allmond: Oh. That was the charge. Isn't that all we're allowed to give, is the charge? We recommended the maximum.

Court: Well, that's what I need to know.

Mr. Allmond: Okay. We recommended 20 years.

Court: You recommended 20 years?

Mr. Allmond: Yes, sir.

Court: Let me see the verdict, please.

(At this time the verdict was given to the Court.)

Court: Mr. Allmond, there's still some problem. The verdict reads: "We the Jury find the defendant, Perry Edward Woolridge, guilty under Instruction No. 2 and recommend a punishment at confinement in the penitentiary for not less than 10 nor more than 20 years. And it's

358

incumbent upon the Jury, as the Instructions read, to fill in the blank with the number of years that the Jury recommends, within that range of the 10 to 20 years, if that's your verdict.

Mr. Allmond: That's our verdict.

Court: No, but I mean if you found the defendant guilty under Instruction No. 2 then it's incumbent to narrow it down to somewhere between the 10 and 20 years. Ten to 20 years is not sufficient. It's got to be 10 years, 11 years, 12 years, 13 years, 14 years, something within that range.

Mr. Allmond: We recommended 20 years.

Court: Now, was that unanimous, also?

Mr. Allmond: That was unanimous.

Court: Well, since there's some confusion, without even waiting for a motion, I'm going to poll the Jury.

Mr. Curtis: Judge, I move, prior to the poll, the Jury be discharged and a mistrial be declared for irregularity in the proceedings. It is apparent to the defendant, Judge, that the Jury did not understand the law or did not understand the instructions as given them on the

359

law.

Court: Or else there's an error in the way they wrote it down, which Mr. Allmond seems to indicate there is. He says they've reached a verdict, but he just didn't write it in properly, and if that's so then it can be corrected. Now, in polling the Jury, if it turns out otherwise then we'll act accordingly.

Mr. Curtis: Judge, would you please move on the ruling on the defendant's motion for a mistrial?

Court: I say that I'm overruling it because I think the way Mr. Allmond explains it it's not a misunderstanding, it's merely a misprision, an error in the way he wrote it down.

Mr. Allmond, you're saying that the verdict of the Jury is that the Jury has found the defendant guilty of First Degree Manslaughter and recommend a punishment of 20 years in the penitentiary?

Mr. Allmond: Yes, sir.

Court: And you're saying that was unanimous?

Mr. Allmond: Yes, sir.

Court: All right. Now, with that in mind, Debbie Geralds, is that your verdict?

Ms. Geralds: Yes, sir.

360

Court: Edward Sterling, is that your verdict?

Mr. Sterling: Yes, sir.

Court: Mrs. Whitaker, is that your verdict?

Ms. Whitaker: Yes.

Court: Mr. Hoehler, is that your verdict?

Mr. Hoehler: Yes.

Court: Mr. French, is that your verdict?

Mr. French: Yes.

Court: Mr. Chappell, is that your verdict?

Mr. Chappell: Yes.

Court: And, Mr. Koppen, is that your verdict?

Mr. Koppen: Yes.

Court: Mr. Preston, David Preston, is that your verdict?

Mr. Preston: Yes, sir.

Court: Okay. Mr. Williams, Kenneth Williams, is that your verdict?

Mr. Williams: Yes, sir.

Court: And, Mr. Allmond,

361

is that your verdict?

Mr. Allmond: Yes, sir.

Court: Mr. Merritt, is that your verdict?

Mr. Merritt: Yes, sir.

Court: And, Mrs. Dargan, is that your verdict?

Ms. Dargan: Yes, sir.

Court: All right. It seems it is unanimous then.

Mr. Curtis: If it please the Court, is that signed by Mr. Allmond?

Court: It's signed by Mr. Allmond. It does read 10 to 20 years, which I'm going to give it back to Mr. Allmond. In view of what he says I think they reached—they obviously reached a verdict but he didn't write it down correctly, but it's been explained. So, Mr. Allmond, if you

would write in there "confinement in the penitentiary—right here in the blank up here write in the 20 years so the verdict will be according to what the Jury actually agreed.

Mr. Curtis: Judge, may the defendant renew his motion for irregularity in the proceedings as he believes the Jury's deliberations have been continued right into the courtroom.

• • • • • • •

APPENDIX C

RENDERED: MARCH 10, 1981
NOT TO BE PUBLISHED

SUPREME COURT OF KENTUCKY

80-SC-385-MR

PERRY EDWARD WOOLRIDGE - - - - - *Appellant*

v.

COMMONWEALTH OF KENTUCKY - - - - - *Appellee*

Appeal from Jefferson Circuit Court
Honorable Richard A. Revelle, Judge
No. 79-CR-0864

MEMORANDUM OPINION OF THE COURT AFFIRMING

Appellant, Perry Edward Woolridge, was indicted for murder in the shooting death of Bill Olive. A jury subsequently found him guilty of manslaughter in the first degree and he was sentenced to 20 years in prison. Woolridge brings this appeal as a matter of right.

In late 1976 or early 1977 appellant purchased a Louisville liquor supply depot known as Perry's Liquors. As a personal favor to the previous owner, appellant agreed to allow Bill Olive to remain on a portion of the premises and sell beer. The parties entered into an oral agreement under which Olive paid a monthly rent and shared in utility costs. Appellant reserved the right to terminate the agreement at any time.

After Olive was a month behind in his rent payments and two months behind in his share of the utility expenses, appellant chose to sever their rental agreement. On the morning of March 3, 1979, appellant came to the premises and put a lock on the door to the part of the business used by Olive. Appellant and some employees began taking inventory of all stock so that Olive would be paid for anything belonging to him. Olive arrived a short time later angered by the locked door and termination of the agreement. He took a hammer and beat the lock off the door. Appellant shot and killed Olive when the latter came toward him swinging the hammer .

Appellant first argues that the evidence was insufficient to support his conviction. On the contrary 16 witnesses testified on behalf of the Commonwealth. Photographs, slides, and other demonstrative evidence was also introduced. A review of the record indicates that it was not unreasonable for the jury to find appellant guilty. *Trowel* v. *Commonwealth*, Ky., 550 S. W. 2d 530 (1977).

Appellant also contends that he was prejudiced by the testimony of Detective Jim Johnson. Johnson testified that appellant refused to answer certain questions about the business relationship with the deceased when he gave a statement to police officers. Appellant argues that his right to remain silent was violated. *Doyle* v. *Ohio*, 426 U. S. 610 (1976). *Doyle*, however, stands for the notion that the prosecution cannot comment on a defendant's silence when he is initially arrested and accused of a crime. Such is not the case here. Appellant chose not to answer questions about a collateral matter and not about the crime itself. This silence was part of a statement in which he had already admitted shooting the deceased.

Appellant further argues that he was denied a fair trial as a result of remarks made by the Commonwealth's Attorney during the opening and closing arguments. In the first instance the prosecutor read the indictment in which the possible sentences were listed as "Death or 20 years to life." Appellant alleges prejudice in that the parties had earlier stipulated that the death penalty would not be sought. The prosecutor immediately corrected himself and stated the sentence as "20 years to life," thereby alleviating any error. Regarding the other allegedly inflammatory remarks, the record reflects that the jury was admonished not to consider the comments in reaching a verdict. Any prejudice therefore was nullified. *Stallings* v. *Commonwealth,* Ky., 556 S. W. 2d 4 (1977); *Hawkins* v. *Commonwealth,* Ky., 481 S. W. 2d 259 (1972).

The final argument surrounds the return and language of the verdict. When asked by the trial court to read the verdict, the foreman responded, "The verdict of this jury is that the defendant will be charged on Instruction No. 2, Manslaughter, for not less than 10 or more than 20 years." When asked for clarification of the sentence the foreman indicated that he did not understand. The trial court explained that the jury must recommend a specific term of years in its sentence. The foreman then stated, "Okay. We recommended 20 years." The judge then polled the jury individually in order to ascertain whether it was their unanimous recommendation that appellant receive a 20-year sentence. Each member said that this was the jury's recommended sentence. The action of the trial court simply

made the verdict conform to the intention of the jury. *See Mathis* v. *Commonwealth*, Ky., 447 S. W. 2d 641 (1969).

The judgment is affirmed.

All concur.

Attorneys for Appellant:

HENRY J. CURTIS
3200 First National Tower
Louisville, Kentucky 40202

FRANK HADDAD, JR.
Suite 529 Kentucky Home Life Building
Louisville, Kentucky 40202

Attorneys for Appellee:

STEVEN L. BESHEAR, Attorney General
RICHARD O. WYATT, Assistant Attorney General
Capitol Building
Frankfort, Kentucky 40601